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In the

Supreme Court of the United States

TRAFFIX DEVICES, INC.,

Petitioner,

v.

MARKETING DISPLAYS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PANDUIT CORP. IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF PANDUIT CORP.

Panduit Corp. submits this brief as Amicus Curiae in the above action in support of Petitioner.[1] Panduit Corp. has the permission of the parties to submit this brief.

INTEREST OF THE AMICUS

Panduit Corp. is the defendant in pending litigation with Thomas & Betts Corp. and Thomas & Betts Holdings, Inc., in the United States District Court for the Northern District of Illinois (Civil Action No. 94 C 2656), which involves claims of trade dress infringement for the subject matter of expired utility and design patents.

In 1998, Panduit Corp. filed a Petition for Writ of Certiorari (Case No. 98-179), which was denied, after the Court of Appeals for the Seventh Circuit reversed the District Court's grant to Panduit Corp. of summary judgment on the trade dress claims. *See Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277 (7th Cir.), *cert. denied*, 525 U.S. 929 (1998). The Court of Appeals for the Sixth Circuit in this action (200 F.3d at 939) cited the Seventh Circuit's decision, as did the Petitioner in its briefs in support of its Petition (Petition, p. 13; Reply, p. 7 n.7).

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[1] Pursuant to Rule 37.6, Amicus states that this brief was not authored in whole or in part by counsel to a party, and that no person or entity other than the Amicus and its counsel made a monetary contribution to the preparation or submission of the brief.

Panduit Corp. writes to advance a view of the issue under review not previously found in the parties' arguments, namely that the bright-line rule enunciated by this Court in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896), should control the Court's decision.

SUMMARY OF ARGUMENT

This Court should use this occasion to reaffirm and follow its holding in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896), and enunciate a bright-line rule that bars trade dress protection for "the thing formerly covered by the patent" because, upon expiration of the patent, the right to make that thing "becomes public property." Such a rule would clarify matters for courts and competitors and stop the erosion of the public's bargain with inventors as set forth in the Constitution. Such a rule also would harmonize the patent laws with the trademark laws.

If this Court declines *per se* to apply *Singer* to this case, it still should find for Petitioner and hold, consistent with *Singer*, that unregistered product features covered by an expired utility patent are not eligible for trade dress protection. At a minimum, this Court should hold, without any additional conditions, that unregistered features claimed in a patent are not protectable under the trademark laws. Whichever of these routes the Court chooses, its guiding light should be to protect the basic tenet of our free market system—that copying is essential.

ARGUMENT

I. THE BARGAIN EMBEDDED IN THE PATENT LAWS IS BASED ON THE CONSTITUTION

The fundamental basis of the patent laws is the bargain between the inventor and the public. The inventor enjoys a private right—for a limited time—to exclude the public from using the invention, in return for public disclosure of the invention and its dedication to the public. This carefully balanced bargain lies in the Patent Clause of the United States Constitution.

Article I provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Following the Constitution's directive, Congress enacted the first patent law in 1790, and defined the limited time of exclusivity. In 1994, Congress amended the present Patent Act to provide that a patent expires twenty years after filing of the application for patent.

As reasoned by this Court, the Framers plainly intended to "promote the Progress of Science and useful Arts" by limiting the period of exclusivity so that the public could use and enjoy the invention once the inventor had reaped the benefits of his or her investment of time, research, and development. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480-81 (1974). Preventing the public from freely adopting the features of the expired patent beyond the limited Times dictated by the Constitution, runs counter to the directive of the Constitution's Framers, and thereby upsets the original patent bargain.

Recent decades have seen a growth in the recognized subject matter of the trademark laws. *See Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 120 S. Ct. 1339 (2000); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995). It is inevitable, therefore, that parties eventually would seek to apply the trademark laws to unregistered trade dress or product configurations found in expired utility patents. This conflict has come to full boil as some beneficiaries of the patent bargain—the patent holders—seek to breach their limited Times bargain by bootstrapping the subject matter of their expired patents to the Lanham Act and preventing the public from enjoying its benefit of the patent bargain. This Court must step in to declare that when the limited Times period ends, the Lanham Act cannot perpetuate the period of exclusivity. The patent holder and the public struck their deal when the patent was granted. This Court should now uphold the bargain by declaring that trade dress protection cannot resurrect what the patent law has laid to rest.

II. THE *SINGER* DECISION OFFERS THIS COURT A BRIGHT-LINE RULE THAT HONORS THE LIMITED TIMES PROVISION OF THE CONSTITUTION

Over 100 years ago this Court faced a case involving expired patents and related trademark claims, *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896). *Singer* provides this Court with the precedent and opportunity to find for the Petitioner and reverse the decision below.

In *Singer*, this Court made a bright-line rule and firmly and unequivocally found that the rights of the patent holder in an invention and the product configuration end with the expiration of the patent. Justice White stated:

> It is self evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We, may, therefore, dismiss without further comment the complaint, as to the form in which the defendant made his machines.

Singer, 163 U.S. at 185.

The benefit to the public of free competition in the manufacture and sale of a product upon expiration of the patent is manifest in *Singer*. There, when the monopoly on the sewing machine ended upon expiration of the patents, prices were "very materially reduced," and competitors sprang up with their own versions of Singer's sewing machines. *Id.* at 174. The plaintiff in *Singer*, predictably, as Respondent has done here and others have done before and since, turned to trademark law in an effort to take away from the public what it had previously been given, namely, the right to make the thing formerly covered by the patent. *See id.* at 174-75.

Since the decision in *Singer*, this Court has held to its view that upon expiration of the patent, "the right to make the article—including the right to make it in precisely the shape it carried when patented—passes to the public." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S.

225, 230 (1964) (citing *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 120-22 (1938)).

This Court also has repeatedly declared that the patent laws amount to a bargain wherein the inventor receives a limited monopoly in exchange for the placement of the invention in the public domain after the patent expires. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989); *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186-87 (1933). Any continuation of the monopoly "after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws." *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 256 (1945).

In *Singer*, the plaintiff marked its sewing machines with the patent numbers that protected them and excluded competition. *Singer*, 163 U.S. at 175. The use of the patent numbers declared to the world that the product was protected, with the price being that the product was free to be copied upon expiration of the patents, and that the patent owner understood this. In this case, Respondent also marked its product with the relevant patent numbers. *See Marketing Displays, Inc. v. TrafFix Devices, Inc.*, 971 F. Supp. 262, 264 (E.D. Mich. 1997), *aff'd in part, rev'd in part*, 200 F.3d 929 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 2715 (2000).

This Court should follow here the bright-line view that it previously declared in *Singer*. Under the rule, Respondent would not be allowed to use trade dress law and the Lanham Act to bar competitors, such as Petitioner, from making the thing formerly covered by the patents

because the right to make it is now public property. *See Singer*, 163 U.S. at 185.

Deciding this case by applying the *Singer* bright-line rule would provide certainty to legitimate competitors in our free enterprise system. When a patent expires, competitors may imitate, and copy if desired, the formerly-patented product.[2] This is the Constitutionally-mandated price for the limited monopoly enjoyed by the inventor.

III. THE *SINGER* BRIGHT-LINE RULE HARMONIZES THE PATENT LAWS AND THE LANHAM ACT

With decisions such as that of the Sixth Circuit in this case, competitors face a quandary when a patent expires: may they copy the invention, as has been their long-standing expectation under *Singer* and its progeny, or will trade dress protection and the Lanham Act step in and do what the Constitution forbids, *i.e.*, extend the limited period of exclusivity in perpetuity? If this Court applies the *Singer* bright-line rule, there will be no question about what a competitor can or cannot do. The patent expired, *ergo,* competitors may fairly compete by making and selling the product previously covered by the patent.

If this Court applies the *Singer* rule to this case, it actually would harmonize patent law with the Lanham

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[2] Of course, if the product were covered by multiple patents, as was the case in *Singer*, the bright-line rule would apply to the features of the product as the patents expired.

Act. Following *Singer* would immeasurably clarify trade dress law, while still allowing for Lanham Act protection in deserving cases. Nonfunctional product design trade dress is, of course, subject to protection under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), if it has acquired distinctiveness and if confusion is likely. *See Wal-Mart*, 120 S. Ct. at 1343; *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

But in the case of an expired utility patent, because the patent owner already has reaped the benefit of the patent bargain, policies and equities shift dramatically away from the patent owner to the public, and the trade dress test for legal functionality is greatly simplified. Under *Singer*, a court considering a product design trade dress claim need look only to the four corners of the patent, the same as the business seeking to compete has a legal right to do. A feature of the patented product is legally functional if it is found in the patent. *See Atlantis Silverworks, Inc. v. 7th Sense, Inc.*, 42 U.S.P.Q. 2d 1904, 1910 (S.D.N.Y. 1997) (granting summary judgment dismissing unfair competition claim because alleged trade dress features were the subject of a utility patent and were, therefore, functional). If the feature is in a patent, it is not protectable under the Lanham Act, and its term of protection under the law will not exceed the life of the patent. This is the only approach that does not do violence to the limited Times mandate of the Constitution, and that reconciles the patent and trademark laws.

If a competitor cannot rely with certainty on the product features disclosed in the patent, and adopt them,

effective competition is restrained as a matter of law and the public automatically loses. This rationale explains why this Court has held that a patent owner may not extend its right to exclude "by resorting to the trademark law and registering as a trademark any particular descriptive matter appearing in the specifications, drawings or claims of the expired patent, whether or not such matter describes essential elements of the invention or claims." *Scott Paper*, 326 U.S. at 256 (citing *Kellogg*, 305 U.S. at 117-20, and *Singer*, 163 U.S. at 185).

Moreover, following the *Singer* bright-line rule and denying trade dress protection to features of expired utility patents does not mean that public confusion will reign. Instead, the patent owner may use the trademark laws to protect the indicia of source, such as the trademark, the packaging, and even the color of the product, if distinctive. At the same time, the competitor who opts to use the features of the expired patent will be required under settled Lanham Act law to adopt its own, different, indicia of source to avoid both confusion and a claim of infringement. Thus, refusing Lanham Act rights in the features disclosed within the four corners of an expired utility patent in no way will subject the public to confusion.

Singer applied the same rationale. In *Singer*, this Court held that the defendant was permanently enjoined "from marking upon sewing machines or upon any plate or device connected therewith or attached thereto the word "Singer," or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the prod-

uct of the defendant or other manufacturer, and therefore not the product of the Singer Manufacturing Company." *Singer*, 163 U.S. at 204. This Court recognized that the public must be kept free from confusion, yet also recognized that there are other means of achieving that aim rather than denying the defendant the Constitutionally-mandated right to copy when a patent expires.

IV. IF THIS COURT ELECTS NOT TO APPLY THE *SINGER* RULE, IT SHOULD HOLD THAT TRADE DRESS PROTECTION DOES NOT EXTEND TO AN UNREGISTERED PRODUCT CONFIGURATION COVERED BY AN EXPIRED PATENT

If this Court declines *per se* to apply the *Singer* bright-line rule, then it still should find, consistent with *Singer*, that trade dress protection does not extend to an unregistered product configuration "covered" by an expired patent. Although such a holding would reduce the scope of the holding in *Singer*, thereby hampering competition to a certain extent, at least it still would preserve the core elements of the limited Times provision. Any feature found in an expired patent would not be eligible for trade dress protection. The rule would be clear to courts and to competitors. Further, such a rule would not foreclose the possibility that the holder of an expired patent could rely on other distinctive source-identifying features to distinguish its products and to maximize goodwill with the public from the products developed by competitors.

Petitioner and Respondent have been vague in their briefs on the Petition for Writ of Certiorari, and in the

Question Presented, as to what "covered by an expired utility patent" means. Panduit Corp. respectfully submits that this Court should declare what is meant by "covered by." This Court should hold that a feature found in any part of an expired utility patent, *i.e.*, the drawings, specification, or claims of an expired patent, is "covered by" the patent, and is available for copying upon expiration of the patent.

V. AT A MINIMUM, FEATURES CLAIMED IN AN EXPIRED PATENT SHOULD BE DENIED TRADE DRESS PROTECTION

At a minimum, this Court should hold that unregistered product features *claimed* in an expired patent may not be protected under trade dress law. Features set forth in the patent claims are the invention for which the patent has been issued. The features in the patent claims have been disclosed to the public via the patent process, and in return the inventor has received a limited Times period of exclusivity. These are the features that must, at a minimum, be denied trade dress protection. To do otherwise would eviscerate the limited Times provision declared and repeated in a legion of this Court's decisions.

VI. THE COURT SHOULD TAKE THIS OPPORTUNITY TO EXPUNGE THE "SIGNIFICANT INVENTIVE ASPECT" REQUIREMENT OF *VORNADO*

The Court of Appeals for the Tenth Circuit decision cited by the Sixth Circuit in this case found that trade dress protection does not extend to features claimed in

an expired utility patent. *See Vornado Air Circ. Sys., Inc. v. Duracraft Corp.*, 58 F.3d 1498 (10th Cir. 1995), *cert. denied*, 516 U.S. 1067 (1996). However, in *Vornado*, the court held that the claimed feature also must be "a described, *significant inventive aspect* of the invention." *Vornado*, 58 F.3d at 1510 (emphasis added).

As noted above, denying trade dress protection to a feature claimed in an expired utility patent is the minimum scope of the holding this Court should issue. The addition by the Tenth Circuit in *Vornado* of the "significant inventive aspect" requirement only furthers the uncertainty experienced by legitimate competitors because it adds an unknown, unquantifiable parameter.

Under *Vornado*, one could have a situation where trade dress protection might extend to a feature claimed in an expired utility patent because it was determined not to be a significant inventive aspect of the patent. This would result in a situation where a feature claimed in an expired patent, and thus a feature that was subject to patent protection during the limited Times period, could receive perpetual protection under the trademark laws because it was later found not to be a significant inventive aspect of the expired patent.

Further, the significant inventive aspect element adds uncertainty to an area where this Court clearly has demonstrated a desire to lessen uncertainty by granting the Writ. Under the rule in *Vornado*, finding the feature in the patent, or in the claims of the patent, would not necessarily mean that it is available for copying upon expiration of the patent. Competitors would have to conduct an ethereal analysis into whether the feature is

a significant inventive aspect. Many situations will likely be close, and legitimate competitors would likely be deterred from copying such a feature—harming the public by denying it the benefits of free competition, and the benefits of the limited Times bargain set forth in the Constitution.

This Court should take this opportunity to state that the "significant inventive aspect" requirement has no part in determining whether trade dress protection may be afforded to a feature claimed in an expired utility patent.

VII. FINDING FOR THE PETITIONER WILL FOSTER FAIR COMPETITION AND FURTHER THE PUBLIC INTEREST

The Founding Fathers had great foresight in drafting the limited Times provision. They realized that the government should encourage American invention and ingenuity by bestowing benefits upon an inventor, but that those benefits should not last in perpetuity. The limited Times provision balances rewarding the inventor with a period of exclusivity and the public interest in fostering competition.

This Court has rightly been true to the limited Times concept. To do otherwise would make fair competition impossible. Free and fair competition needs certainty; the ruling below by the Sixth Circuit only muddies the water.

The cost and time of investigations, legal opinions, and, probably, consumer surveys, place significant re-

strictions on the public's ability to practice the invention and thus operate as a barrier and deterrent to free and open product competition, which is "a fundamental premise of the free enterprise system." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995). Indeed, these investigations, opinions, and surveys would make it economically burdensome for a small competitor to compete by using the teachings of an expired patent. Moreover, even after conducting all of the investigations outlined above and incurring the many necessary investments of time and money, a potential competitor still may face a jury trial, possibly an injunction order to withdraw the product from the market, and possibly a judgment for unknown damages.

Realization of all the benefits of free competition requires the certainty that one can copy the teachings of an expired patent or patented device. This Court has held that "[w]here an item in general circulation is unprotected by patent, '[r]eproduction of a functional attribute is legitimate competitive activity.'" *Bonito Boats*, 489 U.S. at 164. As Professor McCarthy has noted:

> The first principle of unfair competition law is that everything that is not protected by an intellectual property right is free to copy. In fact, copying is an essential part of the whole fabric of an economic system of free competition. Thus, the act of "copying," far from being intrinsically improper, is essential and should be lauded and encouraged, not condemned. There is absolutely nothing legally or morally reprehensible about exact copying of things in the public domain.

J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:122, at 23-270 (4th ed. 1997) (citations omitted).

Petitioner's actions in this case are consonant with the free competition system we enjoy in this country. As the Sixth Circuit found, "[k]nowing that the technology protected by a patent becomes available to the public after the patent expires, TrafFix owner and president Jack Kulp sent an MDI sign to Korea to be reverse engineered into a product he could sell in competition with MDI." *Marketing Displays, Inc. v. TrafFix Devices, Inc.*, 200 F.3d 929, 932 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 2715 (2000). In the wake of the Sixth Circuit opinion, competitors such as Petitioner will be significantly hampered and deterred from copying the product and features in an expired patent for fear of running afoul of the Lanham Act. This result runs contrary to this Court's holding in *Singer* and the Constitution's limited Times bargain.

When one lawfully can copy a commercially-proven device it enhances competition. Other designs that have not been commercially proven and that might become protected by an applied for, but unissued patent, are not equally attractive alternatives. When one is unsure about whether it is legal to copy a proven device, despite it being the subject of an expired patent, free and fair competition, the lifeblood of the American economic system, is severely hampered.

CONCLUSION

The Amicus respectfully asks this Court to reverse the decision below, and hold that trade dress protection does not extend to a product formerly covered by a patent.

Respectfully submitted,

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